BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 41255-g41B BY A.W. ALLRED)

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The time period for filing exceptions and objections to the Proposal for Decision of August 28, 1985 (hereafter, "Proposal"), has expired. Upon uncontested motion by the Objectors, the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") extended the time period to November 4, 1985 for filing exceptions or objections to the Proposal. Objectors Tash Livestock, Inc., Clark Canyon Water Supply Company, and East Bench Irrigation District filed exceptions and supporting memorandum; the Applicant submitted a letter in support of the Proposal.

The Department has reviewed the record herein, and has considered carefully the factual and legal arguments proffered. Pursuant to the Administrative Procedure Act, § 2-4-621(3) MCA (1985), the Department ". . . may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law."

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The Department finds that the proceedings in the above-captioned matter complied with all requirements of law, and that the findings and conclusions in the Proposal, except as expressly modified herein, were based on competent substantial evidence.

The Department accepts and adopts the Proposal as its Final Order herein, and incorporates it herein by reference. The Department's response to the Exceptions is as follows:

Generally

The Department has reviewed carefully the legal and factual arguments cited by the Objectors. Most take issue with a particular phrasing, imply a misleading meaning, or generally argue the facts. As noted above, except as modified herein, the Department finds the Proposal to be supported by the record. While there is evidence on both sides of most factual issues, there always is. That, however, is not grounds for Department reversal.[1]

The Proposal naturally more fully discussed the more hotly contested issues. Such explanation of the grounds for findings and conclusions, however, does not imply that less than all statutory criteria were in issue.

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[1] Many of the specific exceptions raise straw-dogs, or simply allege the Proposal contains something it does not. For example, an objection to a citation to the Department's Don Brown order claims, "There is no evidence in this case concerning hoarding, wasting or carryover storage which would justify this conclusion." Objections p. 7. The Proposal's Conclusion, however, did not find waste at Clark Canyon, and, of course, needed no factual support on this record to cite administrative precedent for the premise that actions to enjoin waste lie in District Court. See, § 85-5-101 - 408 MCA (1985).

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The Objectors repeatedly point to evidence that Mr. Allred's pumping will diminish the water supply. (Paragraphs 3, 5 Objections.) Mere diminution is, however, not in dispute. Whether that diminution will adversely affect any other right holders, is.

The evidence regarding adverse effect indicated the subsurface and surface waters are highly connected, that is, the water occurring beneath the surface of the ground is not ground water within the meaning of the Montana Water Use Act.[2] Seepage from ditches in the area, for example, is a primary source of recharge for the alluvial aquifer. Evidence was offered to show adverse effect from completely dewatering the pit during gravel mining, but no evidence exists whether the much smaller appropriation sought by the Applicant herein would similarly affect other users.

Unless shortages require otherwise, the water distribution in the area is governed not by the traditional priority rules, but rather by the local federal water projects and Irrigation Districts. Chronic water shortages led to the building of Clark Canyon Dam, upstream on the Beaverhead. The water supply company regulates headgates according to the users' shares in the company. Objectors claim that new appropriators must increase

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[2] "'Groundwater' means any fresh water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water." (Emphasis added.) § 85-2-102(9), 85-2-501(3) MCA (1985); In the Matter of the Application for Beneficial Water Use Permit No. 31382-g41J By Kenneth Mikesell, Proposal for Decision, September 20, 1985; Final Order January 21, 1986.

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supply pursuant to purchased shares in the company largely responsible for supply. Hence, the case is complicated factually by the hydrology of the area, and legally by the regime of the river.

The Objectors herein repeatedly argue that any further withdrawal of water from the tributary aquifer, the Beaverhead, or any of its surface tributaries cannot be permitted. The argument is that regardless of actual effect on other appropriators, any further consumptive use must be pursuant to share ownership in Clark Canyon Water Supply.

The Proposal does not ignore the Objectors' evidence that the Beaverhead River was overappropriated prior to construction of Clark Canyon Dam. Assuming arguendo, the veracity of that evidence, where there will be water in at least some years for the new appropriator, the remedy for the senior is to call the junior appropriator. That is, while regulation of unadjudicated streams is offensive to basic due process concerns, State ex rel. McKnight v. District Court, 111 Mont. 520, 14 P.2d 292 (1941); State ex rel. Reeder v. District Court, 100 Mont. 376 47 P.2d 653 (1935); here, the source is adjudicated. The testimony at the hearing indicated the pit could produce water at a volume so great as to be considered a nuisance. While this will inevitably vary each year, because in at least some years there is water available for the Applicant, the junior appropriator is entitled to take his place on the ladder of priorities. Montana Power Company v. Carey, 41 St. Rep. 1233 Mont. 685 P.2d 336 (1984). Should the 1985 priority date prove, as is contended by the

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Objectors, worthless, the Applicant may realign his irrigation schedule accordingly.

Assuming again, that the reason the subsurface water is abundant is the construction and operation of Clark Canyon Dam, the appropriator is only able to keep for himself those waters he can show he added to the system and which he is capable of using. The construction of storage and stream augmentation projects is encouraged by law, and the appropriator therein allowed to use the water which, but for his own exertions, would not otherwise be in the system. Donich v. Johnson, 77 Mont. 229, 250 P. 963 (1926); Popham v. Holloran, 84 Mont. 442, 275 P. 1099 (1929); Ryan v. Quinlan, 45 Mont. 521, 124, P. 512 (1912). On the other hand, one cannot play the dog in the manger with water he cannot control. If there is a period, likely in the early part of the season, that the downgradient appropriators aren't getting their supply, they have the remedy to call for their water as against Mr. Allred. In the later part of the season, however, in at least some years there is excess supply, and the Objectors at these times cannot prevent Mr. Allred from using this water.

Overappropriation

Objectors' argument is grounded in the assertion that the Beaverhead has long been "overappropriated." By Tash's own admission, however, his Statements of Claim of Existing Water Rights (SB76 Claims) claim water use several times more than that actually used. The claims in Exhibit A, which are not the claims

currently on file with the DNRC but rather draft copies, show claims totaling 33,547.5 acre-feet for what Mr. Tash says are 550 acres of irrigation. Such evidence demonstrates the importance of the general adjudication, in which these inflated claims will be examined. In any case, Mr. Tash testified he uses about 4 acre-feet an acre. The claims are, indeed, prima facie proof of their contents. § 85-2-227 MCA (1985). Prima facie means "that which proves a particular fact until contradicted and overcome by other evidence." § 26-1-102(6) MCA (1985). Mr. Tash's own testimony, in this case, contradicted and overcame the filings.

The extent of a right has always been measured by the historic use thereof, so the numbers in decrees, filings, records of declaration, and SB76 Claims are only the starting point for analysis of appropriative rights. 79 Ranch, Inc., v. Pitsch, 40 St. Rep. 981, 666 P.2d 215 (1983); Irion v. Hyde, 107 Mont. 84, 81 P.2d 353 (1938); In the Matter of the Application for Beneficial Water Use Permit No. 51282-s41Q, and Application for Change of Appropriation Water Right No. 139972-s41Q by Ben Lund Farms, Inc., Proposal for Decision, November 8, 1984; Final Order, January 21, 1985.

The difficulty in determining whether unappropriated water exists is that the current regime of the river is not governed by priorities, but rather by a public water supply company. (Testimony of Dick Kennedy.) He alleges that any water use subsequent to the commencement of operation of Clark Canyon Dam is possible only because of the water stored therein. Whether in the first instance the initial users fully take the supply is

not, however, the only problem, as all parties hereto are apparently concerned about subirrigation and surface return flows.

Mr. Allred seeks to pump 550 acre-feet, but all of the evidence at the hearing involved pit pumping of 3,400 acre-feet (Allred) and 2,500 acre-feet (Tash pond). Further, the uncontradicted evidence showed a large well, the Johnson well, producing at an estimated 1,200 gpm in the proximity of the Tash property. Under these circumstances, so much finger pointing at the proposed Allred well for adverse affect to the aquifer is inappropriate.

Requested Findings

Objectors allege further factual findings or conclusions of law are necessary. While the Proposal is adequate on its face, the record supports the following explicit findings as requested, and perhaps, in case of judicial review, the case may be more fully comprehended with additional findings. The Proposal is therefore hereby expanded to include the following:

Findings of Fact

58. The Applicant has three claimed water rights appurtenant to the S½ of Section 4, Township 8 South, Range 9 West, Beaverhead County, Montana. Although Claim Nos. 41B-W-120900, 41B-W-120899, 41B-W-117618, claimed that place of use, each of these claims has been authorized a partial change in place of use to various acres in Sections 5, 6, and 7, Township 8 South, Range 9 West, Beaverhead County, Montana.

59. According to the United States Soil Conservation Service, the average need for irrigation use on approximately 275 acres of alfalfa for this climactic area is in the vicinity of 2 acre-feet per acre. The Water Court uses a figure of 8 acre-feet an acre a high guideline. The need for water on other Applicant lands is not at issue herein. (S.C.S. Guide to Irrigation in Montana.)

60. Attached hereto as Exhibit A, is a copy of the records on microfiche at the Department, showing the "SB76" Claims filed by A.W. Allred.

61. Attached hereto as Exhibit B is a copy of the records on file showing all SB76 Claims with the claimed place of use including the S½ of Section 4, Township 8 South, Range 9 West, Beaverhead County, Montana.

62. According to Objectors' Exhibit N, the amount of decreed rights on the Beaverhead and Red Rock Rivers decreed between 1865 and 1903 is 51,547 inches or, 1,288.675 cubic feet per second. Because of the manner in which the claims data is stored in the computer, the amount of decreed rights claimed (regardless of the validity of those claims) through the current statewide general adjudication cannot reasonably be ascertained prior to the issuance of a temporary preliminary or preliminary decree by the Water Court.

63. The amount of water available from the Beaverhead River cannot reasonably be ascertained at this time, nor is such a finding necessary to the disposition herein.

64. Because of the placement of the exhibit sticker on Objectors Exhibit I, reported shares in the Clark Canyon Water Supply Company for 1984 cannot be discerned therefrom. Such a finding is unnecessary herein.

65. The United States Bureau of Reclamation has filed Statements of Claim for Existing Water Rights for 178,062.00 acre-feet and 2,800 cfs (Objectors Exhibit F) for Clark Canyon Dam.

66. The Applicant retains 6,099.2 acre-feet claimed for the S½ of Section 4, Township 8 South, Range 9 West, Beaverhead County, Montana. That is, according to the Objectors' Exhibit M, the authorization to change the place of use for rights previously appurtenant to the S½ of Section 4 indicates that only 2,500 gpm up to 1,000 acre-feet is changed to the new place of use. It follows that the remainder of these rights remain appurtenant to the property for which this Permit is sought.

Permit Modification--Waste

The information regarding place of use for Mr. Allred's claimed rights numbered 120900-41B, 117618-41B, and 120899-41B was properly before the Examiner in Objectors' Exhibit M. It was legal error not to issue this Permit in conjunction with any other rights the Applicant has which already are appurtenant to the S½ of Section 4, Township 8 South, Range 9 West, Beaverhead County, Montana. The Department cannot sanction waste, § 85-2-114 MCA (1985), nor can it issue a permit for water in excess of that which beneficially can be applied to the stated

purpose. § 85-2-312(1) MCA (1985). That is, "beneficial use" includes the concept of need, and, in the negative, of waste. Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

The Proposal for Decision must be modified to account for the existence of these other rights. Obviously the State remains plagued with records of non-existent rights, or rather, the current recordation of the quantity associated with a right is likely to be as inaccurate today as 100 years ago, despite the fact that inaccuracy is one of the reasons for the adjudication in the first place.

It is unlikely that the Applicant will ultimately be decreed 6,099.2 acre-feet for 160 acres. The filed rights contain, therefore, their own contradiction. Regardless of how it ultimately is decreed, the total amount of rights appurtenant to this place of use cannot exceed irrigation need therefore, and the water user with inflated filings gains nothing thereby. The amount in excess of historic consumptive use is not susceptible of a change in place of use, so under historic Montana Water Law, the appropriator cannot sever and sell these inflated paper claims. The irrigator with paper claims of 30 acre-feet an acre irrigates in much the same manner as the one with paper rights of 5 acre-feet an acre. Nevertheless, in dread of not getting one's own share, some claimants filed for excessive amounts of water; the parties hereto are apparently not exceptions. It must suffice for the Department to modify the Permit to be used in conjunction with other appurtenant rights. Because of apparent water availability in at least some years, Mr. Allred has shown

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all the statutory criteria. The seniors' remedy for those periods of short supply, if an when they occur, is to call on Mr. Allred to cease diverting.

Mr. Allred is limited by the terms of the modified Permit, to that which was silent, but implicit, in the proposed Permit--the amount which can beneficially be used on the appurtenant property. He cannot, for example, under authority by this Permit, flood his property with 6,099.2 acre-feet of water. He can, however, utilize the described point of diversion beneficially to irrigate the described property.

While the Proposal correctly held that irrigation is a beneficial use, no ruling was made as to the amount which beneficially can be applied to the 275 acres. The following additional Conclusion of Law's is, therefore, made a part of the Final Order herein.

24. The Department cannot issue a permit for more than can beneficially be used on the appurtenant property. The Applicant appears to have an undetermined amount of water rights already appurtenant to the property for which he seeks this Permit. Those rights (represented by claim numbers 41B-120900, 41B-117618, and 41B-120899) prima facie status has been rebutted by applicant's testimony regarding his use of water on this property. The applicant has shown existence of the statutory criteria mandating permit issuance, with the express condition

that the volume permitted hereunder cannot exceed that which beneficially can be used on the property. In effect, the issued Permit amounts to a new diversion point, as no volume in addition to that already claimed can be permitted, absent ultimate water court adjudicatory limitation of those rights below a volume which can beneficially be used on the land.

Wherefore, based on the foregoing, and the Proposal for Decision as modified herein, the Department issues the following:

FINAL ORDER

That subject to the following terms, conditions, restrictions and limitations below, Application for Beneficial Water Use Permit No. 41255-g41B be granted to A.W. Allred to appropriate water tributary to the Beaverhead River from a well in the NE¼NE¼SE¼ of Section 4, Township 8 South, Range 9 West, Beaverhead County, Montana. The water appropriated pursuant to this Permit shall be used for irrigation on a total of 275 acres, more or less, located in the S½ of Section 4, Township 8 South, Range 9 West, Beaverhead County, and shall not exceed the rate of 2,000 gallons per minute up to a volume of 550 acre-feet annually. The period of use shall be April 15 through November 15 of each year, inclusive. The priority date for this Permit is February 16, 1982 at 1:48 p.m.

This Permit shall remain conditional until issuance of a final decree on the source. After issuance of that decree, the Department will review the amount decreed on those 275 acres,

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determine whether any additional volume amount can beneficially be used, and adjust the volume amount herein downward accordingly.

This Permit is to be used in conjunction with the water right Claims 41B-W-120899, 41B-W-120900, and 41B-W-117618. In no event shall the Permittee use in excess of the amount required to irrigate the appurtenant 275 acres.

1. This Permit is subject to all prior existing water rights in the source of supply. Further; this Permit is subject to any final determination of existing water rights, as provided by Montana Law.

2. The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Permit.

3. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.

4. This Permit is subject to Section 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

5. The water right granted by this Permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this Provisional Permit.

6. This Permit is granted subject to the right of the Department to modify or revoke the Permit in accordance with 85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with Section 85-2-115, MCA.

7. This Permit is issued as supplementary in conjunction to Statements of Claim numbered 41B-W-120900, 41B-W-117618, and 41B-W-120899. The appropriation

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permitted herein shall not authorize water use in excess of that which may beneficially be applied to the appurtenant property.

8. This Permit is subject to all prior federal reserved rights if any in the source of supply.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 4 day of September, 1986.

Gary Fritz

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620
(406) 444 - 6605

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on September 8, 1986, she deposited in the United States mail, first class postage prepaid, a Final Order by the Department on the Application by A.W. Allred, Application No. 41255-g41B, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Max Fansen, PO Box 1301, Dillon, MT 59725
2. A.W. Allred, 2200 Rebich Ln., Dillon, MT 59725
3. Niel W. Benson, 2025 Highway 278, Dillon, MT 59725
4. Tash Livestock, Inc., c/o William T. Tash, 1200 Highway 278, Dillon, MT 59725
5. Windmill Livestock, c/o Thomas Rice, 1600 Sawmill Rd., Dillon, MT 59725
6. Cloris D. & Laurence J. Yuhas, 1600 Bolick Ln., Dillon, MT 59725
7. Mary Stefanic, 6325 Highway 91 So., Dillon, MT 59725
8. Edward R. Rebich, 3425 Rebich Ln., Dillon, MT 59725
9. East Bench Irrigation District, Clark Canyon Water Supply Co., c/o Richard H. Kennedy, Manager, 1100 Highway 41, Dillon, MT 59725
10. Carl Davis, Attorney, Box 187, Dillon, MT 59725
11. Randall A. Tommerup, 2100 Sawmill Rd., Dillon, MT 59725
12. Ralph J. & Edna M. Keepers, PO Box 424, Dillon, MT 59725
13. William F. Kajin, 2100 Rebich Ln., Dillon, MT 59725
14. Norman & Anna Cossel, 2020 Rebich Ln., Dillon, MT 59725
15. Herbert & Nancy Wheat, PO Box 711, Dillon, MT 59725
16. Earl & Bernadine Paules, 1900 Sawmill Rd., Dillon, MT 59725
17. Aileen O. Peterson Chambers, 1325 Highway 278, Dillon, MT 59725
18. Rich Brasch, Water Resources Division, DNRC, (inter-departmental mail)
19. T.J. Reynolds, Water Rights Bureau Field Office, Helena, MT (inter-departmental mail)
20. Gary Fritz, Administrator, Water Resources Division (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Sally Martinez

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STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 8th day of September, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Ann P. Gilman

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

CASE # 41255

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) ORDER
NO. 41255-g41B BY A.W. ALLRED)

* * * * * * * * * *

On April 2, 1984, the Department of Natural Resources and Conservation issued a Show Cause Order to Objectors Montana Power Company (hereafter, "MPC").

I. Memorandum of Cause by MPC

A. MPC's response to the Show Cause Order also reasserted several of their arguments made in response to the Proposal for Decision in Don Brown. The Department incorporates its response to MPC's arguments numbered 2, 3, 6, 8, 10 as set forth in the Final Order in Don Brown, April 24, 1984.[1]

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[1] These MPC arguments are:

2. Unappropriated water in the proposed source is non-existent.

3. Property rights will be adversely affected.

6. Evidence shows the Power Company's water rights are presently not being satisfied.

8. The Order changes the statutory burden of proof.

10. All Final Orders issued by the Department are afflicted with errors of law and are otherwise improper, and the Power Company has appealed every Final Order which adversely affects its rights.

MPC's argument number 10 is too vague to be responded to with particularity. MPC suggests the hearing officer look at the docket as evidence that MPC has presented arguments that Don Brown is afflicted with errors of law or otherwise improper. MPC's complaint, however, is still too vague to provide the Department any substantive clue as to the errors MPC claims infect Don Brown.

B. MPC's most fundamental objection is that the Show Cause Orders are beyond the DNRC authority. This is incorrect. The Department will first address this issue, settling the arguments numbered 1 and 11 raised by MPC.[2]

(1) Statutory Authority

Among the duties mandated to be carried out by the Department by broad legislative delegation of authority is MCA § 85-2-112(1), (2).

"The Department shall:

(1) enforce and administer this chapter and rules adopted by the board under 85-2-113, subject to the powers and duties of the Supreme Court under 3-7-204;. (emphasis added)

(2) prescribe procedures, forms, and requirements for applications, permits, certificates...and proceedings under this chapter...". (emphasis added)

The only limiting language refers to MCA § 3-7-204. That section refers to the supervision by the Montana Supreme Court of the "activities of the water judge, water masters, and associated personnel in implementing this Chapter and Title 85, Chapter 2, Part 2..." Additionally, the statute provides for the Supreme Court to pay the expenses of the water court and staff. Clearly, MCA § 3-7-204 has no bearing on Departmental authority to administer the new appropriations program.

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[2] These MPC objections are:
1. The Department has acted beyond its authority.
11. The Order is a denial of due process and equal protection guaranteed by both the federal and state constitutions.

With regard to enforcement and administration of the Water Use Act, Chapter 2, there is no limiting statutory provision. The Department must act, in furtherance of the Act's policies and according to its own procedural guidelines under the authority of the statutes and limited only by applicable Board Rules.

The Board has adopted, effective April 27, 1984, procedural rules for water right contested case hearing.[3] Thus, currently, the guiding statutory and regulatory authority is the Water Use Act, the Administrative Procedures Act, and the Board Rules. MCA Title 85, Chapter 2; MCA § 85-2-121; MCA § 2-4-601 et seq.; Administrative Rules of Montana (hereafter, "ARM") Chapter 12, Subchapter 2.

The Department having been expressly delegated the duty to enforce and administer the Water Use Act, Chapter 2, the pertinent provisions thereof frame the question of administrative authority herein. The Water Use Act (hereafter, the "Act") specifies as one of its purposes, the implementation of a constitutional mandate. MCA § 85-2-101(2).[4]

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[3] The result reached herein would be the same under the previously effective Attorney General Model Rules 8-21, governing contested cases. Administrative Rules of Montana §§ 1.3.211-1.3.225.

[4] § 85-2-101(2) provides: "A purpose of this chapter is to implement Article IX, section 3 (4) of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan.

The specific portions of the Act involved herein are found in Part 3 of the Act. Therein, with certain irrelevant exceptions, a person's right to appropriate water is limited to being obtained through compliance with the procedures for applying for and receiving a permit from the Department.

> After July, 1973, a person may not appropriate water except as provided in this chapter. A person may only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive.

MCA § 85-2-301 (1983). Those procedures deemed essential for proper administration and enforcement of the constitutional mandate are specifically detailed in the Act. See, e.g.: evidentiary provision in § 85-2-121 MCA (1983); notice requirements of MCA § 85-2-307; hearing requirements of MCA § 85-2-309 (1983). Similarly, those substantive criteria intended to limit and define delegated departmental duties are explicit. MCA § 85-2-311, MCA § 85-2-402.[5]

Otherwise, of course, it is established that the Act did not change the substantive rules and policies of Montana Water Law, but merely gave the Department authority to administer the collection of rights and responsibilities commonly called "water law" similarly to previous water right administration by District

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[5] Hence, the constitutional requirement of meaningful standards to guide agencies in exercising their delegated authorities is clearly met. ART. III § 1, Mont. Const. See, discussion below. MONT. CONST. art. 3 § 1.

Court. Castillo v. Kunneman, 39 St. Rep. 460, 642 P.2d 1019 (1982). Where the legislature intended to change previous substantive law, or to clarify it, the substantive features of long-time common law were incorporated into the Act. See, §§ 85-2-102(1)(2), 85-2-311, 85-2-402 MCA (1983). Otherwise, the only differences between pre-Act law, and post-Act law, other than those expressly codified in the Act, would be those arising from the difference in the nature of an administrative proceeding, and a proceeding in a District Court. (See, Interlocutory Order, Beaverhead Partnership, re: Burden of Proof, for an example of shifting burden of proof necessarily concomitant to the procedural differences between a District Court action and an administrative proceeding.)

The Act prescribes certain mandatory procedures the Department must follow in applying the substantive determinations required in granting, denying, or conditioning applications for permits and change authorizations. MCA §§ 85-2-307, 85-2-309, 85-2-310, 85-2-402. To impose additional procedural requisites upon the Department would be contrary to the well-known maxim "expressio unius est exclusio alterius". That is, where procedural specifics are imposed on certain Department actions, and excluded in other grants of power, it is assumed that those provisions were intentionally excluded. State ex rel. Dragstedt v. State Board of Education, 103 Mont. 336, 62 P.2d 330 (1936).

The Department's authority to strike the instant objection without hearing arises by necessary implication from these statutes, and the general laws defining and circumscribing the powers and duties of the Department. See, State ex rel. Dragstedt v. State Board of Education, supra.

Determination of whether the MPC objections are valid has been expressly delegated to the administrative discretion of the Department. Where an objection is deemed invalid, the Department has no duty to hold a hearing thereon, and, further, the determination of the validity of the objection is solely within the agency's discretion. "If the department determines that an objection to an application for a permit states a valid objection to the issuance of the permit, it shall hold a public hearing on the objection...". MCA § 85-2-309.

The only statutory limitation to guide the agency's discretion in determining an objection's validity is the legislative standard for minimum contents of objections.[6]

> The objection must state the name and address of the objector and facts tending to show that there are no unappropriated waters in the proposed source, that the proposed means of appropriation are inadequate, that the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation, that the proposed use of water is not a beneficial use, or that the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. MCA § 85-2-308.

Interpretation of § 85-2-308 MCA (1983) must be consistent with § 1-2-106 MCA (1983):

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[6] Further, the objection, to be timely, must be filed within the time limit specified by the Department in the public and individual notice on the application. MCA § 85-2-308.

> Words and phrases used in the statutes of Montana are construed according to the content and the approved usage of the language, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law...are to be construed according to such peculiar and appropriate meaning or definition (emphasis added).

Because the common law of the state has given full dimension to the bare-boned water use statutes, the statutory terms have acquired such an appropriate meaning, e.g.: "beneficial use", Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898); Atchison v. Peterson, supra; Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1924); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900), appropriative "intent"; Featherman v. Hennessey, 42 Mont. 535, 115 P. 983 (1911); Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); St. Onge v. Blakely, 76 Mont. 1, 245 P. 532 (1926); Toohey v. Campbell, supra; "adverse affect"; Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940); unappropriated waters; Carey v. Department of Natural Resources and Conservation, _____ St. Rep._____ (1984); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 89 ALR 200 (1933); Ide v. United States, 263 U.S. 497 (1924).

Hence, in determining the validity of objections, the Department must apply the common law and statutory law of the Act. Application of that law shows that MPC's objections are not valid. See, Don Brown, Final Order.

Whether the facts on an objection tend to show any of the required criteria is a mixed question of fact and law. The facts necessary to allege such a tendency are frequently complicated

and technical matters within the Department's expertise, involving determination of the source of supply for the proposed use, quantification of water in that source, quantities of the objector's water rights and the quantity and nature of the depletive effects of the proposed use. The legal issues involve whether the objector has stated a legally protectible interest by virtue of the facts alleged in the objection. Clearly these issues fall within the reasoning set forth in Burke v. South Phillips County Co-operative State Grazing District, 135 Mont. 209, 339 P.2d 491 (1959):

> Where the question involved is within the jurisdiction of an administrative tribunal which demands the exercise of sound administrative discretion requiring the special knowledge, experience and services of trained officers to determine technical and intricate matters of fact, and where a uniformity of ruling is essential to comply with the state's policy and the purposes of the regulatory statute on review by the court of such decisions by such authorities, the courts will require only so far as to see whether or not the action complained of is within the statute and not arbitrary or capricious. At 218.

In summary, the Department must act in furtherance of the policy of the Montana Water Use Act in administering and enforcing the Act. § 85-2-101 MCA (1983). That policy, when read in conjunction with the remainder of the Act and the one hundred year old case law interpreting prior (but similar) statutes, clearly defines the substantive water law and policies to be applied by the Department in administering the Act. Procedurally, the Department is, of course, limited only by the Montana Administrative Procedures Act, and applicable provision

of the Montana and United States Constitutions. The Department's actions are proper according to all of these applicable substantive and procedural limitations.

Given the Department's specific authority to determine the validity of objections, and the exhaustive analysis of Don Brown, it is clearly within Departmental authority to strike MPC objections, using whatever fair procedures the Department deems appropriate to the case.

(2) Constitutional Authority

Having demonstrated the clear statutory authority for dismissing MPC's objections without hearing, the only remaining roadblock would be if this delegated authority were unconstitutional. It is not. The legislative authority to so delegate stems from a direct constitutional mandate that, "The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records". MONT. CONST. art. 9, § 3, paragraph (4).

The issue is whether the legislature has broached the Montana Constitution's fundamental structure of a tripartite government by delegating unbridled discretion to an agency, i.e., whether the agency is delegated fundamentally legislative functions.

> The power of the government of this state is divided into three distinct branches - legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted. MONT. CONST. art. 3, § 1.

Of course, the analysis begins with the fundamental notion that an act is presumed constitutional, prima facie. State v. Stark, 100 Mont. 365, 52 P.2d 890 (1935). The test for proper legislative delegation of authority to an administrative agency was set out in Bacus v. Lake County, 138 Mont. 69, 354 P.2d 1056 (1960); Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977); and recently affirmed as controlling in T. & W. Chevrolet v. Darvial, 39 St. Rep. 112 (1982). The Court stated in Bacus:

> ...When the legislature confers authority upon an administrative agency it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power which has been made to the administrative agency. The rule has been stated as follows:
>
> 'The law making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers of an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this regard is invalid....'.
>
> ...In the case of Chicago, M.& St. P.R. Co. v. Board of R.R. Com'rs, 76 Mont. 305, 314, 315, 247 P.162, 164 this court has stated:
>
> 'We think the correct rule as deduced from the better authorities is that if an act but authorizes the administrative office or board to carry out the definitely expressed will of the Legislature, although procedural directions and the things to be done all specified only in general terms, it is not vulnerable to the criticism that it carries a delegation of legislative power.' This rule has been approved in Northern Pacific R. Co. v. Bennett, 83 Mont. 483, 272 P. 987; Barbour v. State Board of Education, 92 Mont. 321, 13 P.2d 225; State ex rel. City of Missoula v. Holmes, 100 Mont. 256, 47 P.2d 624, 100 A.L.R. 581; State v. Andre, 101 Mont. 366, 54 P.2d 566; State ex rel. Stewart v. District Court, 103 Mont. 487, 63 P.2d 141; and Thompson v. Tobacco

Root Co-op State Grazing District, 121 Mont. 445, 193 P.2d 811. See also State v. Johnson, 75 Mont. 240, 243 P. 1073. At 78 (citations omitted), 80.

The Water Use Act falls into the category described above, wherein the legislature has delegated to the Department authority to carry out the definitely expressed will of the legislature. Although the procedural directions are expressed in only general terms when such is the case, the agency is free to use its discretion procedurally. State v. Stark, supra.

In T & W Chevrolet, supra, the court applied the test of Bacus and Douglas, and found that a statute and administrative regulations thereunder designed to curb "unfair or deceptive acts or practices in the conduct of any trade or practice..." was not so vague as to be an unconstitutionally prohibited delegation of authority to the Montana Department of Commerce, the Federal Trade Commission or the Federal Courts. In doing so, the court pointed out that the nature of the practices sought to be prohibited demanded the use of general language, but that the well developed case law, amassed over 30 years, had sufficiently given shape and definition to the terms of the act so as to vest the general terms with the requisite meaning for the agency to appropriately administer the act.

The T & W Chevrolet case summarized the holdings in Douglas and Bacus as holding that, "...a legislature must prescribe with reasonable clarity the limits of power delegated to an administrative agency". At 1369. In citing to a Washington case, the T & W court quoted the following language:

> ...The language of the amended federal act...has been with us since 1938. The federal courts have amassed an abundance of law giving shape and definition to the words and phrases challenged by respondent. Now, more than 30 years after the Supreme Court said that the phrase 'unfair methods of competition' does not admit to 'precise definition', we can say that phrase, and the amended language has a meaning well settled in federal trade regulation law... The phrases 'unfair methods of competition' and unfair or deceptive acts or practices have a sufficiently well established meaning in common law and federal trade law, by which we are guided, to meet any constitutional challenge of vagueness. At 1370.

Further, the Court pointed out:

> When reviewing the constitutionality of a given law, it is important to keep in mind the basic premise, well recognized in Montana, that the constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt. T & W Chevrolet, at 1370.

In the instant case, the vast bibliography of Montana Water Law more than sufficiently defines the terms used in the Water Use Act so that the Department may readily ascertain the specific and plain language thereof, and administer the same in accordance with the legislative intent. Hence, the Department has no doubt that the authority it has been delegated by the Act is fully within the legislature's constitutional authority to delegate, was properly delegated, and has been properly exercised herein. Having applied the well articulated Montana law to the allegations of MPC, the Department determined that the objections were not valid, and under the clear terms of the Water Use Act,

MCA § 85-2-309, no hearing thereon is necessary.[7]

MPC's due process argument is without merit. MPC was given more than ample opportunity to state a valid objection, and simply failed to do so. The Department has afforded MPC far more procedural protection than is constitutionally necessary, under both the state and federal constitutions. The Department made clear why MPC's objection is not valid, having provided MPC specific basis to respond to in the show cause order.

MPC, instead, has merely repeated vague shot-gun arguments alleging that the Department does not have the authority expressly delegated to it by § 85-2-309 MCA (1983).

The fair notice and meaningful opportunity to respond requirements of due process have been met several times over. See, Abrams v. Feaver, 41 St. Rep. 1588, 685 P.2d 378 (1984); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983 (1972).

MPC's equal protection allegation is similarly frivolous. To accede to MPC's demands would in fact be setting MPC above the law, denying other objectors equal protection by immunizing MPC from the requirements the class of all other objectors must meet; stating a valid objection in order for the right to a hearing to

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[7] Contrast this situation with Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977), where the court found that a delegation of authority to loan state money based on an unbridled agency determination of a project being "worthwhile" was an unconstitutional delegation of authority. There, the substantive issues had not been so long subject to common law definition as to have already been shaped and defined prior to the statutory enactment.

arise. See, e.g.: Application for Water User Permit No. 53972 by David A. & Linda J. Seed, Application for Beneficial Water Use Permit No. 47841-g76M by John A. March, Jr..

C. MPC alleges that the Department has an independent duty to ascertain the viability of each application, regardless of whether the Department's duty to hold a hearing arises. See, MPC issue No. 4. The Department agrees and has fulfilled that duty in the instant case.

The allegation that, "The Power company and the Department have ofttimes learned of deficiencies of an application during a hearing" has no bearing herein.

D. MPC further objects to the various Departmental functions performed in carrying out the Water Use Act. See, MPC issue No. 5. The roles played by various Department offices and employees are reasonable and necessary to administer the Act. Further, the roles of Departmental staff experts, hearing examiner, and final decision makers are contemplated by the Administrative Procedure Act. See, MCA § 2-4-611; 2-4-614(1)(f); 2-4-621.

E. The fact that the precedent relied on by the Department has not been affirmed by a court is of no consequence. See, MPC Issue No. 7. Until that Departmental action is overruled, it remains a valid guideline for the Department in assuring agency actions are reasonable in treating similarly situated applications consistently.

F. The Show Cause Order neither changes the statutory burden of proof nor deprives MPC of any of its water rights. See, MPC issue No. 8. MPC has not been burdened with any standard of

proof, but merely has been required to do what all objectors must do in order for the right to a hearing to arise - state a valid objection. MPC has been given ample opportunity to submit a valid objection to the Department. It has failed to do so. Hence, the right to participate in a contested case hearing as a party-objector does not arise. § 85-2-309 MCA (1983).

G. The fact that MPC alleges it seeks to protect its ability to generate power for its customers is not germane. See, MPC issue No. 9. MPC's rights and power generation capacity are being protected by the Department already. It simply cannot expand those rights by insinuating the size of its customer base somehow insulates it from the minimum duty of all objectors - to state a valid objection. Every objector and applicant before the Department seeks to protect beneficial uses of water for the benefit of the individual appropriator, customers thereof, or the general public. Where the legislature intends the Department to include economic benefits in the permitting procedure, it expressly so states. See, § 85-2-311(2)(a)(B) MCA (1983). The Permit in issue herein is not subject to that statutory language.

WHEREFORE, based on the foregoing and on the records on file with the Department, the Department hereby issues the following:

ORDER

1. MPC's objections to Application No. 41255-g41B by A.W. Allred are hereby declared invalid and are stricken.

2. The other objections filed hereto remain valid. Therefore, the Department will contact the remaining objectors regarding settlement or hearing in this case.

DONE this 1 day of November 1984.

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6601

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on November 8, 1984, she deposited in the United States mail, certified mail, an order by the Department on the Application by A.W. ALLRED, Application No. 41255-g41B, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. A.W. Allred, 2200 Rebich Lane, Dillon, MT 59725
2. Max Hansen, Attorney, P.O. Box 1301, Dillon, MT 59725
3. Niel W. Benson, 2025 Highway 278, Dillon, MT 59725
4. Tash Livestock, Inc., c/o William T. Tash, 1200 Highway 278, Dillon, MT 59725
5. Windmill Livestock, c/o C. Thomas Rice, 1600 Sawmill Road, Dillon, MT 59725
6. Cloris D. Yuhas and Laurence J. Yuhas, 1600 Bolick Lane, Dillon, MT 59725
7. Mary Stefanic, 6325 Highway 91 South, dillon, MT 59725
8. Edward Rebich, 3425 Rebich Lane, Dillon, MT 59725
9. East Bench Irrigation District, Clark Canyon Water Supply Co., c/o Richard H. Kennedy, Manager, 1100 Highway 41, Dillon, MT 59725
10. Randall A. Tommerup, 2100 Sawmill Road, Dillon, MT 59725
11. Ralph J. and Edna M. Keepers, P.O. Box 424, Dillon, MT 59725
12. William F. Kajin, 2100 Rebich Lane, Dillon, MT 59725
13. Norman and Anna Cossel, 2020 Rebich Lane, Dillon, MT 59725
14. Herbert and Nancy Wheat, P O. Box 711, Dillon, MT 59725
15. Earl and Bernadine Paules, 1900 Sawmill Road, Dillon, MT 59725
16. Aileen O. Peterson Chambers, 1325 Highway 278, Dillon, MT 59725
17. Montana Power Co., 40 East Broadway, Butte, MT 59701
18. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624-Hand deliver
19. T.J. Reynolds, Helena Field Office (inter-departmental mail)
20. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

(A.W. ALLRED) cont.

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 7th day of November, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Ann P. Gilman

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) ORDER TO SHOW CAUSE
NO. 41255-g41B BY A.W. ALLRED)

* * * * * * * * * * *

The objection filed with the Department of Natural Resources and Conservation by the Montana Power Company to the above-named application is identical in language to a number of objections previously filed by this entity with respect to similar applications. These objections all claim generally that there is a lack of unappropriated water available for the applicants' purposes, and that diversions made pursuant to these applicants' plans would result in adverse affect to the water rights claimed by the Montana Power Company. See MCA 85-2-311(1a) and (1b).

No claim is made either expressly or by implication in the present objection that the Applicant's proposed use is not a beneficial one, or that the Applicant's proposed means of diversion are not adequate for his purposes. See MCA 85-2-311(1d) and (1c). Nor has the Department in its own behalf indicated any concerns for the existence of these statutory criteria for a new water use permit. See generally, MCA 85-2-310(2).

Commencing with the Proposal for Decision In re Brown, and continuing through a number of applications where the Montana Power Company presented evidence at hearings held pursuant thereto, the Department of Natural Resources and Conservation has concluded that the scope and extent of Montana Power Company's rights to the use of the water resource as indicated by the evidence therein did not warrant denial of the respective applications for new water use permits. Since the instant objection alleges similar matters to those involved in prior hearings, hearings on the factual issues suggested by the present controversy threaten a waste of time and undue time and expense to the parties involved. See generally, MCA 2-4-611(3) (1981); MCA 85-2-309 (1982). The principles of starie decisis dictate that Montana Power Company be compelled to make a preliminary showing that its objection to the instant application has merit.

WHEREFORE, the Montana Power Company is hereby directed to show cause why its objection should not be stricken and the instant application approved according to the terms thereof. Said Objector shall file with the Department within 20 days of the service of this Order, affidavits and/or other documentation demonstrating that the present Applicant is not similarly situated with respect to prior applicants for whom permits have been proposed over this Objector's objections; and/or offers of proof as to matters not presented in prior hearings, which matters compel different results herein; and/or argument that the proposed dispositions in such prior matters were afflicted by error of law

or were otherwise improper; and/or any other matter that demonstrates that the present objection states a valid cause for denial or modification of the instant application.

DONE this 24th day of April, 1984.

Gary Fritz

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

AFFIDAVIT OF SERVICE
ORDER TO SHOW CAUSE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 24, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by A.W. ALLRED, Application No. 41255-g41B, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. A.W. Allred, 2200 Rebich Lane, Dillon, MT 59725
2. Max Hansen, Attorney, P.O. Box 1301, Dillon, MT 59725
3. Niel W. Benson, 2025 Highway 278, Dillon, MT 59725
4. Tash Livestock, Inc., c/o William T. Tash, 1200 Highway 278, Dillon, MT 59725
5. Windmill Livestock, c/o C. Thomas Rice, 1600 Sawmill Road, Dillon, MT 59725
6. Cloris D. Yuhas and Laurence J. Yuhas, 1600 Bolick Lane, Dillon, MT 59725
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9. East Bench Irrigation District, Clark Canyon Water Supply Co., c/o Richard H. Kennedy, Manager, 1100 Highway 41, Dillon, MT 59725
10. Randall A. Tommerup, 2100 Sawmill Road, Dillon, MT 59725
11. Ralph J. and Edna M. Keepers, P.O. Box 424, Dillon, MT 59725
12. William F. Kajin, 2100 Rebich Lane, Dillon, MT 59725
13. Norman and Anna Cossel, 2020 Rebich Lane, Dillon, MT 59725
14. Herbert and Nancy Wheat, P O. Box 711, Dillon, MT 59725
15. Earl and Bernadine Paules, 1900 Sawmill Road, Dillon, MT 59725
16. Aileen O. Peterson Chambers, 1325 Highway 278, Dillon, MT 59725
17. Montana Power Co., 40 East Broadway, Butte, MT 59701
18. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 (hand deliver)
19. T.J. Reynolds, Helena Field Office (inter-departmental mail)
20. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

(A.W. ALLRED) cont.

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 24th day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Jean P. Gilman

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 41255-g41B BY A.W. ALLRED)

* * * * * * * * * * *

Pursuant to the Montana Water Use Act and the Montana Administrative Procedure Act, the Department of Natural Resources and Conservation, (hereafter, "DNRC" or "Department") held a hearing in the above-captioned matter in Dillon, Montana, on February 21 and 22, 1985.

I. Statement of the Case

A. Parties

Mr. Allred appeared personally and by and through counsel of record, Max A. Hansen.

Objector Tash Livestock, Inc. appeared through William Tash and counsel of record, Carl Davis.

Department staff expert witnesses, Jim Beck and Paul Lemire appeared personally.

Objectors Randall H. Tommerup, Ralph J. and Edna Keepers, Neil Benson, Laurence and Claris Yuhas, Aileen Peterson Chambers appeared personally.

Objector Windmill Livestock appeared by and through its president, C. Thomas Rice.

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Objectors Clark Canyon Water Supply Co. and East Bench Irrigation District appeared by and through counsel of record, Carl Davis.

Objectors Mary Stefanic, Edward R. Rebich, William F. Kajin, Albert and Claudia Kajin, Norman and Anna Cossel, Herbert and Nancy Wheat and Earl and Bernadine Paules did not appear personally or by counsel or personal representative.

Objector Montana Power Company (hereafter, "MPC") timely filed an objection. Its objections were declared invalid and stricken by Order of November 1, 1984, and therefore, MPC did not appear.

B. Exhibits

The Applicant introduced the following exhibits into the record:

Applicant's 1 - Interim Permit to Appropriate Water, granted to A.W. Allred, and dated April 6, 1983.

Applicant's 2 - Application for Beneficial Water Use Permit by A.W. Allred, No. 41255-41B.

The Applicant's exhibits were introduced into the record without objection.

Objector Tash Livestock, Inc., introduced the following exhibits into the record.

Objectors' A-1 through A-7 - Photographs of the Tash Livestock's water sources and various of its means of conveyance.

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Objectors' B - A United States Department of the Interior, Bureau of Reclamation (hereafter, "Bureau"), Missouri River Basin Project, Three Forks Division - East Bench Unit, Montana, Revised Ownership Map, to March 1, 1962. The map depicts the area of the proposed appropriation as well as land ownership of the Objectors.

Objectors' C - Photocopies of eight unsigned Statements of Claim for Existing Water Rights (hereafter, "SB76 claims"), filed by Tash Livestock Company, a corporation.

Objectors' D - A Bureau map of the East Bench Unit dated August 1955. The map purports to show areas receiving full service irrigation, areas receiving supplemental service irrigation, canals, and siphons.

Objectors' E - A table labeled B14 entitled "Water Right Study by Ditches, Beaverhead River, (Clark Canyon Dam Site to Ruby River)" (7 pages).

Objectors' F - A computer printout of SB76 claims filed by the Bureau, containing a general remark noting that, "This is a total record for an irrigation district claim form".

Objectors' G - A photocopy of pages 1-41 from Chapter 1 --General Description, Relationship to Missouri River Basin Plan, "Definite Plan Report" by the Bureau.

Objectors' H - A photocopy of a report entitled, "Investigation of Impacts of Highway Construction and a Proposed Groundwater Appropriation in a Portion of the Beaverhead River Drainage near Dillon, Montana" by Hydrometrics, of Helena, Montana and dated December 15, 1983.

Objectors' I - A photocopy of Clark Canyon Water Supply Company Assessments dated 1984, with a handwritten notation, "revised for 1985".

Objectors' J - A U.S.G.S. Topographical Map showing the Dillon West Quadrangle.

Objectors' K - A photocopy of a page from Department's Exhibit 1, with source of Mr. Tash's (or Tash Livestock's) SB76 claim information highlighted in yellow magic marker.

Objectors' L - Microfilm copies of SB76 claims filed by A.W. Allred and Elaine Allred and stamped numbers 120899, 120900, 117618.

Objectors' M - A microfilm copy of a Montana Authorization to Change Appropriation Water Right, signed by Ronald J. Guse and dated September 23, 1983.

Objectors' N - A certified copy of a List of Decreed Water Rights from Beaverhead and Red Rock Rivers as of August 1, 1926.

At the Hearing Examiner's request, the Objectors also submitted, for the record, a copy of the contract between the United States and the Clark Canyon Water Supply Company, Inc. for Water Service and for a Supplemental Supply. The contract was executed on October 8, 1958.

The Objectors' Exhibits were admitted into the record without objection.

A number of objections to testimony were raised at the hearing. All rulings made from the bench are hereby affirmed. The lack of specificity herein does not impair the right to

appeal based on those rulings, provided prejudice to the overruled party can be shown as a result of admission of evidence objected to.

Aileen O. Peterson-Chambers submitted into the record a statement describing her water right sources and problems she has had with her domestic well and irrigation water supply from Rattlesnake Creek, a copy of an SB76 Claim for irrigation water from Van Camp Ditch (and attachments thereto), and a copy of water assessment sheets from Clark Canyon Water Supply Company for her share of Clark Canyon payments. Mrs. Peterson-Chambers' exhibits were admitted into the record without objection.

The Department offered the following exhibits into the record:

Department's 1 - Computer printouts from the Department showing SB76 claimed water rights filed by Objectors to the proceeding and also water rights claimed from the Beaverhead and within particular counties, townships, ranges and sections.

Department' 2 - Geohydrology Report on Allred Permit Application No. 41255, Beaverhead County, January 21, 1985, by Paul Lemire.

Department' 3 - Memorandum from Jim Beck, dated January 14, 1985, re: Application No. 41255-g41B (A.W. Allred).

Department's 4 - "Soils Report" for Application No. 41255 by Jim Beck, dated June 27, 1984.

Department's 5 - 42 photographs.

Department's 6 - Large aerial photograph of the Allred pond.

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The Department's exhibits were admitted into the record without objection.

The entire file was also moved for admission into the record, and was admitted without objection.

C. Statement of the Case

The Applicant herein seeks to appropriate water by means of a well and pump immediately adjacent to a pit. The water pumped from the well will be drawn first from the pit and then from the surrounding aquifer. Mr. Allred seeks 2,000 gpm up to 550 acre-feet for sprinkler irrigation of 275 acres. The Objectors complain generally that Mr. Allred's pumping will lower the aquifer, causing adverse affect to their domestic pumps or irrigation supplies. Clark Canyon objected on the grounds that the source is subsurface water tributary to the Beaverhead River, and, that because the Beaverhead system is already fully appropriated, any further withdrawal of water for irrigation will result in Clark Canyon having to release compensatory water to thirsty downstream users. Although the early part of the irrigation is the most critical period, this additional appropriation would simply take water from the Beaverhead aquifer, which is alleged to be fully appropriated.

All parties and witnesses agreed that the water source for the proposed appropriation is underground water in the Beaverhead alluvial aquifer. The water is a part of the surface water of the area, but the timing and exact direction of return flows and seepage are not known.

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The matter is further complicated by recent disturbances of the area's historic surface water flow and seepage patterns caused by new highway construction. In fact, the "Allred" pond is actually what was left from gravel excavation done for the highway. Of course, to mine the gravel, the area had to be dewatered, and this dewatering allegedly adversely affected some of the Objectors. Now the gravel is mined and Mr. Allred is left with a pit full of water. The central questions, factually, are whether the timing and extent of underground water movement is such that Mr. Allred will inevitably capture water otherwise available to a downstream senior appropriator, and, conversely, if Mr. Allred's cessation of pumping would result in a noticeable increase in water available for a downstream senior's use.

II. Findings of Fact

1. On February 16, 1982, Mr. Allred filed an Application for Beneficial Water Use Permit to Appropriate 2,000 gallons per minute (hereafter, "gpm"), up to 550 acre-feet per year, for new sprinkler irrigation of 275 acres between April 1 and November 15, inclusive of each year. The source is a pit and the means of diversion is a well.

2. The Department published the pertinent facts of the Application in the Tribune Examiner, a newspaper of general circulation in the area of the source, on May 4, 11, and 18, 1982.

3. The Department has jurisdiction over the subject matter herein, and the parties hereto, whether or not they appeared.

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4. The actual diversion means is a well immediately adjacent to a flooded pit. Although the pump is installed in the well, it is generally agreed that the well will draw, and is intended to draw, water from the pit. (Testimony Jim Beck, Paul Lemire, Mr. Allred, Mr. Botz.)

5. Fifteen objections (in addition to those filed by MPC) were received. The objections all generally allege that additional ground water withdrawal will lower the groundwater table in the area, possibly adversely affecting Objectors' wells, and reduce the subirrigation and seepage predominant in the area. Some Objectors experienced lowered well levels in addition to lowered surface water levels in 1982. (See generally, Department 2.)

6. The pit excavation began as a gravel mining operation in September, 1981. Between September and December, 1981, the pit was dewatered. Although testimony conflicts regarding the length of time the pit was dewatered, (September through November according to Mr. Tash and Mr. Botz, and September through December, according to Mr. Lemire) certainly a substantial amount of water was removed during that time. (See, Finding of Fact No. 43.)

7. Randy Tommerup testified to his concern that if the Allred pit were to be depleted below a certain level, his wells (about a mile above the Allred pit) might go dry. When the Highway Department contractors were pumping to excavate gravel, he noticed one domestic well pumped sand. That well recharged as soon as the water level in the pit rose again, and he has had no

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further trouble since that time. After that period of pumping in 1981, it was approximately two weeks before this well recharged. Subsequent pumping by Mr. Allred has not affected his wells. His wells were not monitored as a part of the Botz study.

8. Neil Benson testified that he waters stock out of lower Rattlesnake Creek, and that during the spring of 1982, i.e.: after the gravel contractor had pumped, the Creek dried up and his stockwater was not available. This domestic well was not monitored, but one of his stock wells was. Of the 40 years he knows of, this was the only time that happened.

9. Larry Yuhas testified that he had two stock wells he was concerned about, one of which went dry in the spring of 1981. He also testifed that he thought his well problem occurred the spring after general contractors pumped from the pit, and that he has not experienced any problems since the gravel operation ceased and the highway went in.

10. Ralph J. Keepers testified that his springs, just northeast of the Allred pit, have diminished approximately 50% since the winter of 1982. These springs are claimed stockwater sources, and now require springtime ice chopping. These springs are separated from the Allred pit by the Highway. Mr. Keepers didn't know whether his problem was caused by the pumping, the existence of the Allred pit, or the work connected with the highway construction. The springs froze in 1982 and 1983.

11. 1984 was a flood year for the area of concern. All parties had far in excess of their needs during the spring runoff.

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12. Tom Rice (Windmill Livestock) testified that he has a stock well and domestic well from 3/4 to 1/2 mile south of the Allred pit, and that while he hasn't yet experienced any problem with his wells, he is afraid of a long-term adverse affect caused by a lowering of the water table. His wells were not monitored as part of the Botz study.

13. The area of concern is a relatively highly transmissive aquifer: that is, the soils are gravelly and highly permeable so the ground water moves through the area relatively rapidly. The primary source of recharge to groundwater wells appears to be precipitation and leakage, runoff, and seepage occurring after commencement of irrigation in the spring. These local characteristics are identified by area ranchers, as well as the expert witnesses herein. (Testimony Mr. Allred, Mr. Tash, Mrs. Peterson-Chambers, Paul Lemire, Max Botz.) Because of these geologic characteristics, water users downstream in the valley are able to rely on the return flows and underground seepage for irrigation water. This supply, provided upstream irrigation occurs, is dependable.

14. The system discharges to creeks, rivers, sloughs, and ditches. The subsurface water system is a part of the surface water system so that withdrawals, from either system, if large enough, will impact the other.

15. Subsurface water movement and surface water movement is generally to the northeast. (Department 2; Objectors' H.)

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16. Subsurface water levels rise in the summer, after high spring runoff and the onset of irrigation. Irrigation water leaks through ditches to recharge the underground aquifer. (Testimony Mr. Tash, Mr. Allred, Department 2, Objectors' E.)

17. On April 6, 1983, the Department issued an Interim Permit to Mr. Allred allowing him to commence the appropriation sought herein. This Permit expired on April 4, 1984. Mr. Allred did irrigate pursuant to this authority during the 1983 irrigation season. Mr. Allred estimates he pumped approximately 171 acre-feet during this time. (Applicant's Exhibit 1, testimony of Mr. Allred.)

18. During 1983, the groundwater level in the area rose during the summer. This is evidenced by rises of between 1 foot to over fifteen feet in monitored wells. (Objectors' E.)

19. The diversion and appropriation means are adequate and customary for irrigation in the area. (Testimony Jim Beck.)

20. Mr. Botz was retained by the Objectors to do a monitoring study of the surface and ground water in the area of concern. His company, Hydrometrics, monitored 20 wells in the area and surveyed the surface water occurrence in an attempt to evaluate the possible impacts caused by new highway construction and Mr. Allred's appropriation. (Objectors' E.)

21. In April 1982, Mr. Tash noticed significant declines in streamflow in Rattlesnake Creek and Van Camp Slough. Highway construction was occurring at this time, but there was then no pumping from the Allred pit. (Objectors' E, testimony of Mr. Allred.)

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22. In May of 1982, Mrs. Peterson-Chambers' well was so low that it pumped sand. She also stated that in 1982 Van Camp Slough was extremely low and that Rattlesnake Creek went dry for the first time since she had lived there-- since 1961.

23. None of the parties experienced any low flows in 1983, which was a flood year in this area.

24. Mr. Tash uses water for his irrigation and stock water from the Van Camp Ditch, Rattlesnake Slough, and Downing Spring.

25. The unsigned and unnumbered copies of SB76 claims submitted as Objectors' Exhibit C, do not accurately reflect the claims as filed. Claim No. 88858-41B, has been amended, and an implied claim has been filed in connection therewith. "Not the one filed-same as amended" appears in pencil, handwritten on the top of one of the claims. These discrepancies are of no consequence to the disposition herein. The SB76 claims for Tash Livestock show substantial claims were filed, but actual use appears to be governed instead by the operation of Clark Canyon Dam. (Testimony of Dick Kennedy, Mr. Tash.)

26. Mr. Tash brings his irrigation water from Clark Canyon to his property through the Van Camp Ditch. His filed water rights for irrigation are supplied principally from Rattlesnake Creek.

27. After the water table comes up during the summer, for example, after the first of July, Mr. Allred's appropriation has no adverse effect on Mr. Tash's operation. Only during the early critical irrigation does Mr. Tash allege his water supply is short. (Testimony Mr. Tash, p. 364, 365, 368, 369.)

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28. The irrigation season varies annually with seasonal fluctuations, but May 15 is an estimated earliest starting date. (Testimony Mr. Tash, p. 373.)

29. Mr. Tash estimated ditch loss in the Van Camp Ditch from the diversion point to the latter reaches of the ditch, to be 40% (p. 381).

30. Mr. Tash noticed a real reduction in surface flows on the Van Camp Slough when highway construction crews installed some perforated pipes underneath new Highway 15. Mr. Tash contends those pipes were improperly placed (Transcript p. 384, 385).

31. Mr. Tash had a balance unused from Clark Canyon Water Supply Company for 1981, 1982 and 1983 (Transcript p. 393).

32. During the period the highway contractors were dewatering the Allred pit, the excess water was discharged into the Van Camp Ditch. The discharge was over and above what the ditch would carry (Transcript p. 398, 399).

33. Mr. Tash is currently involved in litigation against the State of Montana, and its contractors, for damages to his water rights, allegedly resulting from negligent highway construction and the mining of Allred's gravel. He contends that highway construction has reduced surface water flow to his property.

34. If the Applicant used the pit merely as a diversion point from April 22 to July 1, then used the pit water as a supply source thereafter, Mr. Tash would not suffer adverse effect (Transcript p. 426).

35. A gravel pit was excavated on Mr. Tash's property also for use in the highway construction. It, too, has filled with water, but Mr. Tash testified that he has never pumped water from it, nor does he intend to do so in the future (p. 385). During its active mining period, between March and May of 1982, it was also dewatered.

36. Mr. Tash testified he suffered crop losses in 1982, 1983, and 1984, due to lack of water. Irrigation of some of those lands is by flood and "subirrigation".

37. It appears that Mr. Tash's primary allegation of injury regards the lowering of the water table so that less subirrigation is available in the early spring, or "critical period". This conclusion is based on his testimony that it isn't practical to turn water into the ditches before thaw, and that his 1982 losses were caused not by a lack of irrigation water as to the whole season, but only during the critical period (p. 439...). Apparently, Mr. Tash objects herein to maintain the status quo of the aquifer. His own testimony was contradictory on the issue of whether he would object to the Applicant's pumping after July 1. In more than one instance, he said he would object to <u>any</u> further appropriation in the area (e.g.: p. 444, 445). However, he also stated that after the groundwater table is recharged and the levels in the ground water and the pit have risen, there is usually enough water for all, indeed, he alleges injury from excess water being pumped into the Van Camp ditch during 1982. (Transcript p. 426, 427.) Hence, he testified that after July 1, or so, Mr. Allred's pumping helps him alleviate excess water.

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38. The Applicant's pumping under authority of the Interim Permit had no apparent effect on any wells in the area. Possible effect on the surface flow of the Beaverhead could not have been calculated.

39. Mr. Allred also pumped approximately 347 acre-feet from the pit in 1984, however, during that period he used the pit solely as a means of diversion, i.e.: he replaced the water pumped from the pit with water he received from Clark Canyon. (Testimony, Mr. Allred.)

40. There are unappropriated waters in the source of supply, in at least some years, in the amount the Applicant seeks and throughout the period the Applicant seeks to appropriate.

41. The source of supply for Applicant's use is ultimately tributary to the Beaverhead River.

42. The annual recharge of the aquifer in issue is sufficient to compensate for the water withdrawn during the irrigation season. That is, the average annual subsurface withdrawal does not appear to be greater than the average annual recharge. With the exception of 1982, there has not been an historical lowering of the groundwater table.

43. Exceptional withdrawals from the aquifer occurred in late 1981 and 1982. Both the Tash and Allred ponds were being dewatered for gravel mining. The mining required constant, or near constant, pumping to keep the pits dry. 3,400 acre-feet may have been pumped from the Allred pond and 2,500 acre-feet from the Tash pond. Hence, in 1982, 5,900 acre-feet, or more, was withdrawn from the aquifer. (Department 2.)

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44. The proposed irrigation will be of material benefit to the Applicant.

45. Using a worst-case scenario, the Department geohydrologist estimated that no serious impact would occur to any of the objectors from the proposed appropriation, although a one to two feet drawdown could occur in the Benson or Stefanic Wells. This drawdown is predicated on a continuous pumping schedule, i.e.: on the assumption that the Applicant would pump continuously at 2,000 gpm until the entire 550 acre-feet were appropriated. This assumed pumping schedule is highly unrealistic. Under a more reasonable pumping schedule, the cone of depression would be less severe, as the aquifer would have time to recharge itself in between the periods of pumping.

46. The effect on other appropriators is related to the amount of water pumped from the pit. That is, the effect of pumping 3,400 acre-feet would be far greater than any possible effect of pumping 550 acre-feet. (Testimony Paul Lemire, testimony Max Botz, Transcription p. 504.)

47. The 1982 reduction in water supply to appropriators in the area could have been caused by the gravel mining dewatering or the incidents of highway construction. (Testimony Max Botz.)

48. The two expert witnesses generally agreed upon the usual direction of ground water movement and effect to the aquifer of pumping from the Allred pit. They differed on the shape of the estimated cone of depression in that Mr. Botz estimated an elongated cone because of the relatively lower transmissivity for the Rattlesnake aquifer. (Mr. Botz, Transcript p. 510.)

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49. Mr. Lemire relied on Mr. Botz's monitoring study as a basis for his study.

50. Mr. Lemire did not calculate the timing of possible effects from pumping which could accrue to the surface sources in the area, but indicated that such a calculation can be made. (Transcript p. 264.) Because of the agreed highly transmissive nature of the aquifer, Mr. Lemire assumed the calculated time of effect would be within the range of the irrigation system.

51. Mr. Botz and Mr. Lemire disagreed as to whether pumping from the pit would increase the seepage from Van Camp Ditch. Mr. Lemire testified that the rate of seepage would not likely be effected, whereas Mr. Botz indicated that such a conclusion could not be reached without more data.

52. A Mr. Johnson has a well next to Mr. Tash's property line. This well has an estimated capacity of 1,200 gpm. Pumping from this well could have been partially responsible for Rattlesnake Creek drying up in 1982. (Testimony Mr. Botz, Transcript pp. 516-520.)

53. When the level of water in the Allred pit is below the level of the bottom of the Van Camp Ditch, there is a loss of water from the ditch to the pond. (Testimony of Max Botz, Transcript p. 524.)

54. The levels of the surface water in the Van Camp Slough and Rattlesnake Creek vary widely depending on the time of year. It appears the surface water fluctuations follow the same pattern as the subsurface fluctuations. (Testimony Max Botz, Transcript p. 528.)

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55. The creation of the pond apparently has altered the subsurface flow in the area. It's mere existence, that is, has altered the flow. This effect is not attributable to any amount of pumping therefrom. Hence its existence must be taken as the current status quo, and must be factored out of the "adverse effect" analysis for purposes of the Water Use Act. (Transcript p. 564.)

56. Although Mr. Botz's description of the cone of depression is likely the more accurate, the difference is not so significant as to change the disposition herein.

57. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

III. Conclusions of Law

1. The Department has jurisdiction over the parties and over the subject matter herein.

2. The Department gave proper notice of the hearing, and all substantive and procedural requirements of law or rule have been met and, therefore, the matter was properly before the Hearing Examiner.

3. MCA § 85-2-311 directs the Department to issue a permit if:

(a) there are unappropriated waters in the source of supply:
  (i) at times when the water can be put to the use proposed by the applicant;
  (ii) in the amount the applicant seeks to appropriate; and

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(iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed use, irrigation, is a beneficial use. MCA § 85-2-102(2); Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905); In the Matter of the Application for Beneficial Water Use Permit No. 50240-s40J and 50241-s40J by Larry and Phyllis Simpson, Final Order, October 31, 1984.

5. Beneficial use is the base, measure and limit of the appropriative right. Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); In the Matter of the Application for Beneficial Water Use Permit No. 50240-s40J and 50241-40J by Larry and Phyllis Simpson, Final Order, October 31, 1984.

6. The Applicant showed by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriated works are adequate.

7. The water the Applicant seeks to appropriate is not ground water within the meaning of the Water Use Act. "Groundwater" means any fresh water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and which is not a part of that surface water. MCA § 85-2-501(3) (emphasis added).

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8. The water the Applicant seeks to appropriate is "water." "'Water' means all waters of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse water, surface water, and sewage effluent." § 85-2-102(14) MCA (1983). Prior administrative decisions include subsurface tributary water as a part of the connected surface waters. In the Matter of the Application for Beneficial Water Use Permit No. 14,965-g41E and Application for Change of Appropriation Water Right No. 19,230-c41E by Thomas H. Boone, Trustee, Final Decision, May 21, 1981; In the Matter of the Application for Beneficial Water Use Permit No. 31711-g41O by Miller Colony, Inc., Final Order, June 14, 1984.

9. The weight of evidence shows there is unappropriated water in the source of supply at times when the water can be put to the use proposed by the Applicant, in the amount the Applicant seeks to appropriate, the amount required is available. Although there may be some years when a senior call might require the Applicant to cease pumping, all that need be shown is that there is sufficient water in at least some years for the Applicant's appropriation, and that the Applicant's appropriation is, in fact, administrable. In the Matter of the Beneficial Water Use Application No. 43117-s41P by Morris Mancoronal, Final Order, June 14, 1984. The appropriative system by its very nature contemplates that the supply is less than the rights therein, as it is the foundation for the rule of which appropriator is to

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forego exercise of its rights in those times of shortage. "First in time first in right" would never operate if no call were ever made. MPC v. State ex rel. Carey, 41 St. Rep. 1233, 685 P.2d 386, (1984).

10. Identification of the particular effect on Rattlesnake Creek, Van Camp Slough or the Beaverhead River caused by this appropriation is unnecessary for a senior downstream user to make his call: it is enough to show that his water rights are not being satisfied and that he is senior. That is true if one assumes the Beaverhead River is over-appropriated or, at least, fully appropriated. (See discussion, below.)

11. Whether the Beaverhead River is fully appropriated is impossible to tell from the record herein. Witnesses for Clark Canyon and for Mr. Tash repeatedly referred to the current distribution system as being one which, in normal years, has sufficient water for all. The very purpose of the Clark Canyon project was to alleviate earlier chronic water shortages, and this purpose apparently has been achieved. (Testimony Dick Kennedy.) In the dry year, however, where water users are controlled by the water commissioner, the Applicant herein must curtail his use for downstream seniors, whether those seniors appropriate from the Beaverhead, its tributaries, or from wells down gradient.

If actual administration of the Beaverhead River improperly deprives the Applicant of his water in priority, his remedy lies in a District Court. That is, if Clark Canyon is operating with excess carry-over storage, such that its operation of the dam can

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be characterized as waste, Mr. Allred would have an action against that entity to enjoin the waste. (See, e.g. In the Matter of Don Brown, Final Order, April 24, 1984, wherein the Department held that the Bureau was wasting water in Canyon Ferry reservoir by hoarding unused carry-over storage.)

12. The existence of the standing water in the pit, and the rapid response of the water levels in the wells to the onset of irrigation indicate strong surface water-subsurface water connection, (at least regarding surface to subsurface flow), and a relatively high water table. Hence, substantial credible evidence exists that no adverse effect will be caused to other subsurface water appropriators by the Applicant's appropriation. The pumping under authority of the Interim Permit, although less in volume than the full appropriation, did not prevent the characteristic rise in water level of the monitored wells, nor did any of the witnesses testify to any adverse effect or any lowering of the water table except during times such lowering would most likely be attributable to the pumping done by the gravel miners.

13. Although the Applicant claimed the water to be appropriated was "ground water" and hence not subject to stream administration, there is no cavil that the water is tributary to the Beaverhead River. (Transcript p. 560.) Even had the experts disagreed, the common-law of Montana, as expressed in the definition of ground water in the Water Use Act, is that subsurface water is presumed tributary. This resulted in an

almost insurmountable burden upon one who claims to have developed subsurface water and added water thereby to the natural flow of the tributary surface stream. In any case, there is no reason that subsurface water should not be administered in deference to surface rights. If there was ever a contrary rule, it was discarded by the Department in In re Boone, wherein an appropriation from a pit was denied on the grounds that the river system to which it was tributary was fully appropriated. Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909); Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966). This is not to say that a groundwater appropriator cannot prove the source non-tributary. "Modern Hydrological innovations have permitted more accurate tracking of groundwater movement. For this reason, we feel that traditional legal distinctions between surface and ground water should not be rigidly maintained where the reason for the distinction no longer exists." Perkins at 363.

Administration of the priority system relies on priorities on a given source. Hence, where two appropriators are appropriating from the source or a connected source, their priorities must be administered conjunctively. Loyning v. Rankin, 118 Mont. 235, 165 P.2d 1006 (1946); Granite Ditch v. Anderson, 40 St. Rep. 630 (1983).

Equally true, here, is the axiom that no appropriator may call a junior when the call would be futile.

> The right to call a junior appropriator is limited to those times and situations where increased supply will result to the senior's headgate. Beaverhead Canal Co. v. Dillon Electric Light and Power, 34 Mont. 135, 85 P. 880 (1906); Raymond v. Wimsette, 12 Mont. 551, 31 P. 537 (1982). See generally Thrasher v. Mannix, 95 Mont. 273 (1933), (where a change in point of use could not be enjoined where such injunction would not result in greater flow of water of plaintiff's point of diversion.)

In the Matter of the Beneficial Water Use Permit No. 43117-s41P by Morris Mancoronal, Proposal for Decision, at 14. This is merely the logical converse of the rule that a senior appropriator may not call a junior where the senior is already receiving his appropriative right. Kelly v. Granite Bi-Metallic Con. Mining Co., 41 Mont. 1, 108 P. 785 (1910); Donich v. Johnson, 77 Mont. 229, 250 P. 963 (1926).

14. The fact of a subsurface connection, however, does not lead inexorably to the conclusion of adverse effect. Forrester v. Rock Island Oil Co., 133 Mont. 333, 323 P.2d 597 (1958).

Substantial credible evidence exists on both sides of the fence, so to speak. The Department's expert testified that the pumping of 550 acre-feet in a usual irrigation pattern will not adversely affect any objectors. It can be concluded from his testimony that by the time any effect could occur, the water table would have risen, and there would be enough water for all. The expert for the objectors, however, assumed that because of the subsurface-surface water connection, any removal of water from the system would be adverse effect. (Transcript p. 584.)

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15. The testimony and evidence presented shows that all parties have sufficient water in a normal year. Mr. Tash testified that he had a balance unused from his water rights stored in Clark Canyon even in the years he claimed crop loss from lack of subirrigation in the early part of the season.

The objectors are not entitled to hoard water in Clark Canyon and thus prevent further appropriations downstream therefrom. Because the source is tributary to the Beaverhead, however, they are entitled to require the Applicant to join the ladder of priorities thereon, and be subject to any court appointed water commissioner on the Beaverhead River, when Clark Canyon runs out of storage water.

16. If the Beaverhead River is overappropriated, the showing that the source for the Application herein is tributary would be sufficient for denial of the Permit on the grounds of failure to establish lack of adverse effect. § 85-2-311(1)(5). MCA (1983); Hall v. Kuiper, __ __ Colo. _____, 510 P.2d 329 (1973). In Hall, the state engineer's office denied applications to drill two wells found tributary to the Cache La Poudre, tributary to South Platte, there being no unappropriated water in those surface sources, and it having been shown that the wells would draw from those sources. The court upheld the engineer's decision that no permits could issue. This was the ruling despite the fact that injury to any particular user could not be traced. In quoting from Fellhauer v. People, 167 Colo. 320, 447 P.2d 986 (1968) the court held,

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> The defendant maintains that the 1965 Act must be enforced on a case-by-case basis, i.e.: injury by a particular well to a particular prior surface right. However, we hold that, whenever a court or water administration official can make a finding that the pumping of a junior well materially injures senior appropriators who are calling generally for more water there exists a legitimate and constitutional ground and reason for the regulation of the well, and a showing of a call against that well by a paraticular senior user is not necessary.

Ball at 331.

17. Of course, if the SB76 claims are taken as absolute proof of water rights in those quantities claimed, it may well be that the Beaverhead River is overappropriated. Without ruling on the effect of the SB76 claims, it may be noted that the uncontradicted testimony at the hearing was that there is sufficient water after the water table comes up in the summer. Hence, the Applicant has made sufficient showing of water availability to mandate permit issuance. MPC v. State ex rel. Carey, 41 St. Rep. 1233, 685 P.2d 336 (1984).

When, and if, the water users of the Beaverhead need turn to the water commissioner, the Applicant will be subject to his administration. This condition is sufficient to protect the seniors, as they have no right to force the Applicant to shut-down when they have a balance unused of their water rights stored in Clark Canyon, or elsewhere. (See, Findings of Fact 70-74, In the Matter of the Application for Change of Appropriation Water Right Nos. 36294-c41A, 36295-c41A, 36296-c41A 36297-c41A, 36298-c41A, 36299-c41A, 36300-c41A and 36301-c41A by Beaverhead Partnership, Proposal for Decision, February 11, 1985.

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18. The authority of a court appointed water commissioner to regulate the Applicant's well is derived from § 85-5-101 MCA (1983).

> (1) Whenever the rights of persons to use the waters of any stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply have been determined by a decree of a court of competent jurisdiction, it shall be the duty of the judge of the district court having jurisdiction of the subject matter, upon the application of the owners of at least 15% of the water rights affected by the decree, in the exercise of his discretion, to appoint one or more commissioners. The commissioners shall have the authority to admeasure and distribute to the parties owning water rights in the source effected by the decree the waters to which they are entitled, according to the their rights as fixed by the decree and by any certificates and permits issued under chapter 2 of this title. Where petitioners make proper showing that they are not able to obtain the application of the owners of at least 15% of the water rights affected and they are unable to obtain the water to which they are entitled the judge of the district court having jurisdiction may, in his dicsretion, appoint a water commissioner. (Emphasis added.)

19. The Department has no authority to adjudicate the rights of the Objectors herein. The effect on shareholders' state appropriative rights of language in the contract between the United States and Clark Canyon reflecting the shareholders agreement to curtail full exercise of their rights is left to the water court.

20. The "developed water" cases are not relevant for purposes of denying the present Application, as the Applicant herein does not appear to claim to have added water to the system. Woodward v. Perkins, 116 Mont. 46, 173 P.2d 1016 (1944);

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Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966). In those cases, the court noted that subsurface water is presumed tributary, and that an applicant who claims to have developed water has the burden of showing by scientific methods of proof that the water sought to be appropriated is not, in fact, a part of the subsurface flow of the stream.

Here, the evidence indicates a strong surface-subsurface connection, but it also indicates that no adverse effect will be caused to other appropriators except in the rare dry year. In these circumstances, it is sufficient protection for the appropriator to be subjected to the traditional ladder of priorities, and for the seniors to rely on future stream administration for their remedy.

21. Mr. Lemire testified that the maximum drawdown which could be predicted theoretically, but which he did not believe would ever, in fact, occur, would not result in any subsurface appropriator needing to deepen a well. On the facts on the record herein, and assuming, without deciding, that the Objectors' means of diversion are adequate, so long as the appropriators can obtain their appropriative right through their well, any lowering of the water table is not adverse effect within the meaning of Montana Water Law.

Irrigators, be they surface water appropriators or subsurface appropriators are not entitled to insist on subirrigation and maintenance of the water table at a status quo. Water use by subirrigation is not a protectible means of diversion. In re Beaverhead, infra; see, In the Matter of the Beneficial Water Use

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Application No. 31441-g41R by Jim McAllister, Proposal for Decision, June 18, 1985. In the Matter of the Application for Beneficial Water Use Permit No. 18845-s76LJ and No. 18846-s76LJ by Everett G. and Anna C. Orem, Final Order, September 14, 1984.

22. The gravamen of Mr. Tash's complaint seemed to be that any lowering of the water table would deprive him of the historic level during the critical period. This he is not entitled to protect. Reliance on an uncontrolled level of subsurface water is waste. See Don Brown, Supra.

Montana follows the appropriation doctrine, as does Colorado. Both states have water policies emphasizing maximum utilization of the states' water resources.[1]

[1] "All surface, underground, flood, and atmospheric waters written the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." Mont. Art. IX, Section 3, Paragraph 3.

It is a policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural ecosystems.' § 85-2-101(3) MCA (1983).

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In Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (Colo. 1961), a senior well appropriator sought to enjoin defendant's junior well pumping because "when the defendants pumped water during the time it was needed by plaintiffs for irrigation purposes it was not available because the water table was lowered below the intake of plaintiffs' pumping facilities." At 554. In reversing the lower court's injunction the Colorado Supreme Court held,

> At his own point of diversion on a natural water course, each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole or a substantial flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled. Schodde v. Twin Falls Land and Water Co., 224 U.S. 107, 119, 325 Ct. 470, 56 Led. 686. This principle applied to diversion of underflow or underground water means that priority of appropriation does not give a right to an inefficient means of diversion, such as a well which reaches to such a shallow depth into the available water supply that a shortage would occur to such senior even though diversion by others did not deplete the stream below where there would be an adequate supply for the seniors lawful demand." At 555.

The case was remanded to the lower court for consideration of what plaintiffs needed to do to increase their diversion facility's efficiency because, while they could not effectively lock up the aquifer, neither should they be required to improve their well beyond their economic reach.

Being a seriously water short state, Colorado has emphasized their policy of maximum utilization of water to the point of suggesting that where well appropriators are administered in

conjunction with surface water appropriators (whenever the well is appropriating tributary water), the reasonable means of diversion rule, "...under certain circumstances, surface stream appropriators may be required to withdraw underground water tributary to the stream in order to satisfy their surface appropriators." In the Matter of Rules and Regulations Governing the Use, Control and Protection of Water Rights for Both Surface and Underground Waters Located in the Rio Grande and Conejos River Basins and Their Tributaries. Alamosa La Jara Water Users Protection Association v. Gould, _____Colo. ____, 674 P.2d 914, 935 (1984).

23. We need not go so far. Here, all that need be held is that none of the objectors have the right to maintain the status quo of the aquifer so that they may rely on subirrigation for the early irrigation of their crops.

WHEREFORE, based on the foregoing, the Hearing Examiner hereby makes the following:

PROPOSED ORDER

That subject to the following terms, conditions, restrictions and limitations below, Application for Beneficial Water Use Permit No. 41255-s41B be granted to A.W. Allred to appropriate water tributary to the Beaverhead River from a well in the NE¼NE¼SE¼ Section 4, Township 8 South, Range 9 West, Beaverhead County, Montana. The water appropriated pursuant to this Permit shall be used for irrigation on a total of 275 acres, more or less, located

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in the S½ of Section 4, Township 8 South, Range 9 West, Beaverhead County, and shall not exceed the rate of 2,000 gallons per minute up to a volume of 550 acre-feet annually. The period of use shall be April 15 through November 15 of each year, inclusive. The priority date for this Permit is February 16, 1982 at 1:48 p.m.

1. This permit is subject to all prior existing water rights in the source of supply. Further; this permit is subject to any final determination of existing water rights, as provided by Montana Law.

2. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

3. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.

4. This permit is subject to Section 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water

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supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

5. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this Provisional Permit.

6. This permit is granted subject to the right of the Department to modify or revoke the permit in accordance with 85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with 85-2-115, MCA.

DONE this 28th day of August, 1985.

Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

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NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed Order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1).

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on August 29, 1985, she deposited in the United States mail, First Class mail, a Proposal for Decision by the Department on the Application by A.W. Allred, Application No. 41255-g41B, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Max Hansen, P.O. Box 1301, Dillon, MT 59725
2. A.W. Allred, 2200 Rebich Lane, Dillon, MT 59725
3. Niel W. Benson, 2025 Highway 278, Dillon, MT 59725
4. Tash Livestock, Inc., c/o William T. Tash, 1200 Highway 278, Dillon, MT 59725
5. Windmill Livestock, c/o C. Thomas Rice, 1600 Sawmill Road, Dillon, MT 59725
6. Cloris D. Yuhas and Laurence J. Yuhas, 1600 Bolick Lane, Dillon, MT 59725
7. Mary Stefanic, 6325 Highway 91 South, Dillon, MT 59725
8. Edward R. Rebich, 3425 Rebich Lane, Dillon, MT 59725
9. East Bench Irrigation District, Clark Canyon Water Supply Co., c/o Richard H. Kennedy, Manager, 1100 Highway 41, Dillon, MT 59725
10. Carl Davis, Attorney, Box 187, Dillon, MT 59725
11. Randall A. Tommerup, 2100 Sawmill Road, Dillon, MT 59725
12. Ralph J. and Edna M. Keepers, P.O. Box 424, Dillon, MT 59725
13. William F. Kajin, 2100 Rebich Lane, Dillon, MT 59725
14. Norman and Anna Cossel, 2020 Rebich Lane, Dillon, MT 59725
15. Herbert and Nancy Wheat, P.O. Box 711, Dillon, MT 59725
16. Earl and Bernadine Paules, 1900 Sawmill Road, Dillon, MT 59725
17. Aileen O. Peterson Chambers, 1325 Highway 278, Dillon, MT 59725
18. Paul Lemire, Water Resources Division, DNRC, (inter-departmental mail)
19. T.J. Reynolds, Water Rights Bureau Field Office, Helena, MT (inter-departmental mail)
20. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

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STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 29th day of August, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Lohn

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 3-1-88

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